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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 15

CHARLES L. MCNALLY, PETITIONER

v.

HENRY C. HILL, WARDEN, UNITED STATES NORTHEASTERN PENITENTIARY, LEWISBURG, PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court (R, 47–49) has not been reported. The opinion of the Circuit Court of Appeals (R. 53–59) is reported in 69 F. (2d) 38.

JURISDICTION

The judgment to be reviewed was entered February 13, 1934. (R. 60.) The petition for writ of certiorari was filed March 31, 1934, and granted May 7, 1934. (A. 62.) The jurisdiction of this Court to issue the writ rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the petitioner is entitled on *habeas corpus* to release from the sentence imposed upon him under the third count of one of the two indictments upon which he was convicted, because that count charged him with having, with knowledge of its theft, sold a stolen motor vehicle which "had theretofore been transported in interstate commerce", instead of charging him, in the language of Section 4 of the National Motor Vehicle Theft Act, with having sold a stolen motor vehicle "moving as, or which is a part of, or which constitutes interstate commerce."

STATUTES INVOLVED

These are set forth in the Appendix, *infra*, pp. 39–40.

STATEMENT

Two indictments, one containing three counts and another containing a single count, were returned against the petitioner in the District Court of the United States for the Eastern District of New York. The first count, of the indictment containing three counts, which will hereinafter, for the purpose of brevity, be called Indictment 28944, charged the petitioner and others with conspiring to transport a number of stolen automobiles in interstate commerce and with conspiring to receive, conceal, barter, and sell the automobiles

so transported. (R. 12–20.) The second count charged the defendants with the interstate transportation of a stolen motor vehicle. (R. 20–21.) The third count, which is the one here involved, charged that (R. 22–23):

> the defendants, on or about the 12th day of February, 1930, at Jersey City, in the State of New Jersey, did unlawfully, knowingly, and wilfully, sell a certain motor vehicle, to wit: a Lincoln Sedan, 1929 model, original motor number 59638, original serial number 59638, which said motor vehicle had theretofore been transported in interstate commerce, from the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York, to Jersey City, in the State of New Jersey, and which said motor vehicle had theretofore been stolen from the true owner thereof, on or about the 14th day of December, 1929, at the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York, the said defendants knowing that the said car so sold as aforesaid, had been stolen and transported in interstate commerce; against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided (Title 18, United States Code, Section 408).

It is charged in overt act one of the conspiracy count that the same vehicle was transported by the defendants from Brooklyn, N.Y., to Jersey

City, N.J., on February 3, 1930, nine days before the vehicle was sold. (R. 15.)[1]

The other indictment hereinafter called Indictment 28945, charged the petitioner and others with conspiring to transport another stolen motor vehicle in interstate commerce and with conspiring to receive, conceal, barter, and sell this vehicle. (R. 26–31.)

The petitioner was convicted upon all of the counts of these two indictments. (R. 24, 34, 44.) Under Indictment 28944 he was sentenced to imprisonment for two years on the first count (the conspiracy count), and to imprisonment for four years on each of the two remaining counts. The judgment provided, however, that the sentence on the first count should be served concurrently with the sentences on the second and third counts, and that the sentences on these counts should run consecutively. (R. 24, 45.) The commitment issued in connection with these sentences provided that the sentences should date from November 30, 1931.

[1] Neither the docket entries in connection with this indictment, appearing at R. 24, nor the "Chronology of Proceedings in New York Court", appearing at R. 41–47, which apparently relates only to Indictment 28944, indicate that there was filed any demurrer or motion to quash the indictment. While the "chronology" discloses that towards the close of the trial a motion to dismiss the third count was made on behalf of the petitioner (R. 43), that there were also made on his behalf a motion to set aside the verdict and a motion in arrest of judgment (R. 44), and that these motions were denied, the grounds of the motions are not set forth in the record.

(R. 35–36.) On Indictment 28945 petitioner was sentenced to imprisonment for two years (R. 34), the commitment providing that the sentence should date from December 10, 1931. (R. 39.) It is evident, therefore, that the sentence under Indictment 28945 was in effect a sentence to be served concurrently with those under Indictment 28944, and that the aggregate sentence imposed upon the petitioner under the two indictments was eight years.

The petitioner did not appeal from either of the two judgments but entered promptly upon the execution of his sentences. (R. 37, 40.)

On April 6, 1933, the petitioner filed in the District Court of the United States for the Middle District of Pennsylvania, a petition for a writ of *habeas corpus* (R. 3–9) in which he alleged that he was then serving the sentences imposed upon him under the two indictments in the United States Penitentiary at Lewisburg, Pennsylvania. He sought in this petition to be relieved of the sentence of imprisonment imposed upon him under the third count of Indictment 28944, upon the ground hereinafter stated. No attack was made upon the validity of the sentences imposed upon the other counts of the two indictments and petitioner admitted that he could be validly imprisoned thereunder for a term of four years. (R. 7.) He alleged that he had served one-third of such valid four-year term; that under the Parole Act a prisoner who has served one-third of his sentence is entitled, upon applica-

tion, to his release upon parole if his behavior has been good. (Act of June 25, 1910, c. 387, Sec. 1, 36 Stat. 819, as amended by the Act of January 23, 1913, c. 9, 37 Stat. 650; U.S.C., Title 18, Sec. 714); that his behavior had been good and that he had violated none of the rules of the penitentiary; and that he was being deprived of his right to apply for parole by reason of the invalid sentence imposed upon him under the third count of Indictment 28944.

No attack was made in the petition for writ of of *habeas corpus* upon the third count of Indictment 28944 upon the ground here urged, the petition alleging merely that the District Court of the United States for the Eastern District of New York was without power to impose the four-year sentence upon this count because the offense charged therein was committed outside of the territorial limits of that District, the sale of the vehicle having occurred in Jersey City, N.J., which was within the territorial jurisdiction of the District Court of the United States for the District of New Jersey. (R. 6–7.)

In response to the petition for writ of *habeas corpus* a rule was granted directing the warden of the penitentiary to show cause why a writ of *habeas corpus* should not be issued as prayed in the petition. (R. 10.) After a hearing the District Court dismissed the petition and discharged the rule to show cause. (R. 1, 47–49.) It held that under the

National Motor Vehicle Theft Act venue may be laid in any district in or through which the stolen motor vehicle has been transported or removed, and that the Eastern District of New York was one of such districts. The court further held that the right of a defendant to be tried in the State and District wherein the crime was committed is one which a defendant may waive, and that such right was waived in the instant case by the petitioner, even if it be conceded that he should have been tried in the District Court of the United States for the District of New Jersey, because the petitioner had not raised the question in the criminal proceeding but had first presented it on *habeas corpus*.

As the opinion does not discuss the present contention of the petitioner that the third count of Indictment 28944 was defective because it did not charge in the language of the statute that the vehicle was in interstate commerce at the time of sale, that question was apparently not presented in any form to the District Court.

An appeal was taken by the petitioner from the decision of the District Court to the Circuit Court of Appeals for the Third Circuit. The assignment of errors filed in connection with this appeal gave no indication of the question now urged. The assignments were couched in general language and were to the effect simply that the District Court erred in not directing that the petitioner be dis-

charged from serving the alleged invalid sentence upon the third count of Indictment 28944. (R. 49.)

Although it was raised apparently for the first time in that court, the Circuit Court of Appeals considered and disposed of the contention which petitioner now urges. (R. 54–55.) After stating (R. 55) that it would not commit itself "on the question whether or not this proceeding for a writ of *habeas corpus* is an attempted substitute for an appeal from the judgment of sentence," the court reached the conclusion, based upon its consideration of the purpose of the National Motor Vehicle Theft Act and the evil at which it was aimed, that "The Congress intended [to punish] a sale of a stolen motor vehicle which, having been unlawfully moved in interstate commerce and coming to rest, continues so closely related to that commerce as to remain 'as a part of' it." (R. 58.) The court then held (R. 58–59):

> Applying these observations to the averments of the third count of the indictment in this case as affecting interstate commerce, which are very similar, indeed almost identical, with those which were involved in *United States* v. *Drexel,* 56 F. (2d) 588, we are of opinion, in accord with the Circuit Court of Appeals for the Second Circuit, that the allegation, in the past tense, that the stolen motor vehicle had, before the sale, been transported in interstate commerce, was, if a defect, rather one of form than

of substance under Section 556 of Title 18 U.S.C.A., and we are also of opinion, in accord with the thought in the *Drexel* case, that at any rate "within Section 391 of Title 28 of U.S.C.A. (28 U.S.C.A. Sec. 391) if not strictly a formal it was certainly a 'technical defect' which did not 'affect the substantial rights of the parties.' The pleader had been inept in expressing his meaning but that meaning was clear."

The third count of the indictment in this case shows that the characteristic of interstate commerce remained in the vehicle at the time of sale. The facts were, we assume from the verdict and in default of an appeal, proved at the trial. It is, on the verdict, not disputed that the car was stolen in one district, transported to another district, there, without change of character, received by the relator, knowing it to have been stolen and transported, and by him sold, thus bringing the case on the averments of the count and on the proofs within the jurisdiction of the court that tried him.

It is not clear from the opinion of the Circuit Court of Appeals whether the question of venue was urged in that court. While there was some discussion of venue in the court's opinion, the reference thereto was, it would seem, merely incidental to the court's discussion of the question now presented. (See R. 58.) The question of venue is not discussed at all in the petition for writ of

certiorari and we consequently do not deem it necessary to consider it in this brief. Cf. *Johnson* v. *Manhattan Ry. Co.*, 289 U.S. 479, 494.

SUMMARY OF ARGUMENT

I

The count of the indictment which is in controversy sufficiently discloses an offense within Federal cognizance to render it immune from successful attack by a petition for a writ of *habeas corpus*. This writ calls in question only the jurisdiction of the court whose judgment is challenged. Consequently, the only question to be determined is the sufficiency of the indictment to show such jurisdiction. This is a much narrower question than is involved in a direct attack upon the indictment by demurrer or on appeal, in which case the indictment must be sufficient to inform the defendant of the nature of the offense and to advise him adequately of the charge which he must meet. The writ of *habeas corpus* cannot be used as a substitute for appeal, even though the petitioner may have failed to avail himself of his right to appeal. If the count in question apprised the trial court that it dealt with an offense which that court had jurisdiction to try, it was sufficient. This it clearly did. In fact it is fairly arguable that the indictment was sufficient even as against a direct attack.

II

The application for a writ of *habeas corpus* is premature, even assuming that the count in the indictment previously referred to was fatally defective. Petitioner was convicted also on another count, the validity of which he concedes and was sentenced to serve a term of four years thereupon, which term has not yet been completely served, even allowing to petitioner credit for all possible "good time" deductions. Consequently, the petitioner is in custody in execution of a valid sentence under a valid indictment. The fact that his privilege of applying for release on parole is interfered with by the existence of the second sentence does not make a writ of *habeas corpus* available to him.

ARGUMENT

I

THE COUNT IN CONTROVERSY SUFFICIENTLY DISCLOSES AN OFFENSE WITHIN FEDERAL COGNIZANCE TO RENDER IT IMMUNE FROM SUCCESSFUL ATTACK ON HABEAS CORPUS

The question here urged was apparently not raised in the trial court and consequently need not have been considered in the Circuit Court of Appeals (*Roberts* v. *Riley*, 116 U.S. 80; *McCarthy* v. *Arndstein*, 262 U.S. 355; *Ex parte Keizo Kamiyama*, 44 F. (2d) 503, 505 (C.C.A. 9th), and cases

cited). However, the question was considered and disposed of by that court, and we, therefore, assume that it is open for consideration here. *Friend* v. *Talcott*, 228 U.S. 27, 36.

In pursuing this inquiry it should be noted at once that, as was said in *Knewel* v. *Egan*, 268 U.S. 442, 445—

> It is the settled rule of this Court that *habeas corpus* calls in question only the jurisdiction of the court whose judgment is challenged. *Andrews* v. *Swartz*, 156 U.S. 272; *Bergemann* v. *Backer*, 157 U.S. 655; *In re Lennon*, 166 U.S. 548; *Felts* v. *Murphy*, 201 U.S. 123; *Valentina* v. *Mercer*, 201 U.S. 131; *Frank* v. *Mangum*, 237 U.S. 309.

An attack upon an indictment, by a petition for a writ of *habeas corpus* is, therefore, a very different matter than an attack by demurrer, or upon appeal. The first raises the very limited question whether the indictment is sufficient to show jurisdiction in the court, the second the much larger question whether the indictment was sufficient to inform the defendant of the nature of the offense and to advise him adequately of the charge which he must meet. It is well established by the decisions of this Court that *habeas corpus* may not be used as a mere substitute for a writ of error or an appeal. As was said in *Dimmick* v. *Tompkins*, 194 U.S. 540, 551–552:

> It is also objected that the facts charged in either the first or fourth count of the in-

> dictment did not constitute any offense under the statute, and that the sentence was therefore without jurisdiction. * * * It is not, however, necessary in this case to decide the point, *for the indictment charged enough to show the general character of the crime, and that it was within the jurisdiction of the court to try and to punish for the offense sought to be set forth in the indictment.* If it erroneously held that the indictment was sufficient to charge the offense, the decision was within the jurisdiction of the court to make, and could not be reexamined on *habeas corpus.* The writ cannot be made to do the office of a writ of error. Even though there were, therefore, a lack of technical precision in the indictment in failing to charge with sufficient certainty and fullness some particular fact, the holding by the trial court that the indictment was sufficient would be simply an error of law, and not one which could be reexamined on *habeas corpus. Ex parte Parks,* 93 U.S. 18; *In re Coy,* 127 U.S. 731; *In re Eckart,* 166 U.S. 481. (Italics ours.)

And in the case of *Knewel* v. *Egan, supra,* this Court made the further statement (p. 446):

> It is fundamental that a court upon which is conferred jurisdiction to try an offense has jurisdiction to determine whether or not that offense is charged or proved. Otherwise every judgment of conviction would be subject to collateral attack and review on *habeas corpus* on the ground that no offense

was charged or proved. It has been uniformly held by this Court that the sufficiency of an indictment cannot be reviewed in *habeas corpus* proceedings. *Ex parte Watkins*, 3 Peters 193; *Ex parte Yarbrough*, 110 U.S. 651; *Ex parte Parks, supra; In re Coy, supra; Bergemann* v. *Backer, supra; Howard* v. *Fleming*, 191 U.S. 126; *Dimmick* v. *Tompkins*, 194 U.S. 540; *In re Eckart*, 166 U.S. 481; *Goto* v. *Lane*, 265 U.S. 393.

That the petitioner may have failed to avail himself, as in the instant case, of his right to appeal does not change the rule. *Goto* v. *Lane*, 265 U.S. 393, 402; *Ex parte Spencer*, 228 U.S. 652, 659, 661; *Glasgow* v. *Moyer*, 225 U.S. 420, 430; *Kaizo* v. *Henry*, 211 U.S. 146, 148; *In re Lincoln*, 202 U.S. 178, 182; *Riggins* v. *United States*, 199 U.S. 547, 551.

It is evident, therefore, that the scope of the inquiry in this case is not whether in the count in controversy the element of interstate commerce was alleged with the particularity and precision which would enable it to withstand a successful attack by motion or demurrer or on an appeal in the criminal proceeding but whether the allegation was sufficient to disclose to the court, in which the petitioner was tried and convicted, that the pleader was charging an offense within Federal cognizance and not one wholly colorless or impossible (*Manning* v. *Biddle*, 14 F. (2d) 518, 519 (C.C.A. 8th)) or one patently within the jurisdiction of a State

court. (*White* v. *Levine*, 40 F. (2d) 502 (C.C.A. 10th).)[2]

If the count in controversy can fairly be considered as having apprised the trial court that it dealt with an offense of which that court as a Federal court had jurisdiction to try, no matter how ineptly it may have done so, it accomplished all that is required on *habeas corpus*. In other words, as was said in *Franklin* v. *Biddle*, 5 F. (2d) 19, 20 (C.C.A. 8th):

> The question in this case * * * is not the sufficiency of the indictment * * * against a direct attack by demurrer or motion in the trial court; it is its sufficiency to invoke the exercise of the jurisdiction of the court * * * which tried [the defendant] * * * to decide, if it had been requested by the defendant in the proper time so to do, whether or not that indictment was sufficient to require him to stand trial thereunder. And the test of jurisdiction is not right decision but the right to enter upon the inquiry and make some de-

[2] In *Manning* v. *Biddle* the petitioner was convicted as an aider or an abettor of an alleged offense which was not condemned by any Federal statute. In *White* v. *Levine* the indictment charged the petitioner with forging the name of the payee on a Government check "with intent to defraud the American Trust Co., St. Louis, Missouri," instead of charging that the forgery was done with the intention of defrauding the United States, as required by Section 29 of the Criminal Code. It is evident that if this indictment stated any offense it charged one of State and not Federal cognizance.

cision. *Foltz* v. *St. Louis & S. F. Ry. Co.*, 60 F. 316, 318, 8 C.C.A. 635; *King* v. *McAndrews*, 111 F. 860, 864, 50 C.C.A. 29.

Did the count in controversy meet this test? We submit that it is sufficiently evident therefrom that the pleader was attempting to charge an offense against Section 4 of the National Motor Vehicle Theft Act to warrant the exercise of jurisdiction by the trial court. Section 4 provides that "whoever shall * * * sell * * * any motor vehicle, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be punished," etc. Now, the count in question specifically charged that the vehicle had been stolen from its true owner in Brooklyn, New York, on December 14, 1929, that it had been transported from Brooklyn to Jersey City, New Jersey; that the petitioner and his co-defendants knew that the automobile had been stolen and that they knew that it had been transported in interstate commerce; and that with this knowledge they sold it on February 12, 1930.

The statute provides that it applies to a vehicle "moving as, or which is a part of, or which constitutes interstate * * * commerce." The count in controversy alleges that the vehicle in question "had theretofore been transported in interstate commerce" from Brooklyn to Jersey City. Can there be any doubt that this was sufficient to apprise a Federal court of the fact that the pleader was attempting to charge an offense under the

National Motor Vehicle Theft Act and to permit it to determine, if it had been requested to do so, whether or not the offense was properly charged? *Dimmick* v. *Tompkins, supra; Knewel* v. *Egan, supra.* As a matter of fact it is fairly arguable that the indictment is sufficient on its face to withstand direct attack. The allegation is that the vehicle in question "had theretofore been transported in interstate commerce." Does this not sufficiently set forth that characteristic of interstate commerce whch is referred to in those words of the statute, "* * * or which is a part of, or which constitutes interstate * * * commerce?" Certainly it cannot be contended that this allegation is equivalent to an averment that interstate commerce in the vehicle had ceased.[1] It states that

[1] With reference to a quite similar situation this Court said in *United States* v. *Pridgeon*, 153 U.S. 48, 59: "If the indictment does not fairly and sufficiently aver that the offence in question was committed in the Cherokee Outlet, *it certainly does not show affirmatively upon its face that it was committed elsewhere, and without the jurisdiction of the court.* It may be that upon demurrer or writ of error, the indictment might have been found defective in not alleging with greater certainty the particular locality in which the offence was committed, within the rule laid down in *McBride* v. *The State*, 10 Humph. Tenn.) 615, but it cannot be properly held that the indictment is so fatally defective on its face as to be open to collateral attack after trial and conviction, or that the sentence of the court pronounced thereon was void. The *habeas corpus* proceeding being a collateral attack of a civil nature, *it must clearly and affirmatively appear that the indictment charged an offense of which the court had no jurisdiction, so that its sentence was void.* This does not appear in the present case. (Italics ours.)"

prior to sale the vehicle had been physically brought from Brooklyn to Jersey City. This, of course, constituted interstate commerce. The statute and the decisions leave it beyond doubt that interstate commerce does not end at the very moment that the stolen vehicle is brought across a State line. As was said by this Court in *Brooks* v. *United States,* 267 U.S. 427, 439, with reference to Section 4 of the Act:

> The fourth section merely makes more effective the regulation contained in the third section. The third section punishes the transportation of a stolen automobile with knowledge of the theft. The fourth section punishes the receipt, the concealment, the storing, the bartering, the sale, or the disposition of such stolen vehicle, moving as interstate commerce, or as a part thereof, with knowledge of its having been stolen. Of course, this section can and does apply only to the storing or concealment of a stolen automobile with knowledge of its theft, *as a final step in the use of interstate transportation to promote the scheme of its unlawful disposition and the withholding of it from its owner.* (Italics ours.)

It is evident, therefore, that the characteristic of interstate commerce did not depart from the vehicle until some "final step" had been taken by those cooperating in the unlawful scheme of withholding the machine from its rightful owner. The "final step" is ordinarily, of course, the sale of

the vehicle, and interstate commerce in the vehicle certainly cannot end until, at least, the vehicle reaches the hands of someone not a party to the scheme. As was said in *Wilkerson* v. *United States*, 41 F. (2d) 654, 655 (C.C.A. 7th), certiorari denied, 282 U.S. 294, of a conspiracy to transport automobiles in interstate commerce and to receive, conceal, store, barter, sell, and dispose of them, "the conspiracy operated until the automobiles were final disposed of and lodged in the possession of some person who was not, at any stage, a party to the conspiracy." See also *Loftus* v. *United States*, 46 F. (2d) 841, 846–847 (C.C.A. 7th).

Applying these observations to the count in question, the District Court had before it, in determining whether it had jurisdiction to proceed, a count which charged that an automobile had been stolen in Brooklyn on a certain day; that it had been put in the channels of interstate commerce by transporting it from Brooklyn across the State line to Jersey City; that less than two months after its theft, the defendants, with full knowledge of the theft and with full knowledge that it had been transported in interstate commerce, sold this automobile in the State to which it was transported, thereby accomplishing what was evidently intended to be the "final step" of the unlawful scheme. Moreover, possession of a stolen vehicle in a State other than that of its rightful owner within a short time after its theft has been held to raise a re-

buttable presumption or inference that the possessor was the thief and had transported the vehicle in interstate commerce. *Drew* v. *United States*, 27 F. (2d) 715 (C.C.A. 2d), and cases cited.[4] The count in question alleged sale (and, of course, inferentially the possession) by the defendants within less than two months after its theft of a vehicle stolen in one State and transported into another. Obviously this was not an unreasonable length of time within which to accomplish the successful disposition of a stolen motor vehicle within the vicinity of its theft. It is true that at the trial the defendants might be able to rebut any inference arising from possession, but this certainly did not preclude the court, in passing upon the initial question of jurisdiction if it had been asked to do so, from taking into consideration any inferences which might properly be deemed to flow from the averments of the count. It should also be pointed out that in the conspiracy count of the same indictment the court was specifically informed by the allegations of overt act one that the

[4] *Wolf* v. *United States*, 36 F. (2d) 450 (C.C.A. 7th), does not appear to be *contra*. There it was held that if the inference arising from possession extended not only to the fact of theft by the possessor but also to the fact that he had transported the vehicle in interstate commerce, the inference was rebutted by the evidence in the case. Moreover, in the later case of *Wilkerson* v. *United States*, 41 F. (2d) 654, 657 (C.C.A. 7th), the same court appears to have accepted the authority of the *Drew* decision without question.

vehicle was transported by the defendants from Brooklyn to Jersey City on February 3, 1930, only nine days before it was sold by the defendants. (R. 15.)

The position of the Circuit Court of Appeals in this case was that the count in question sufficiently disclosed that the stolen vehicle was in interstate commerce when sold to render it immune from attack even if the question had been raised on an appeal in the criminal proceeding, and that *a fortiori* it would withstand attack in a proceeding for *habeas corpus*. The court said (R. 58–59) that it was of the opinion, in accord with the ruling of the Circuit Court of Appeals for the Second Circuit in *United States* v. *Drexel*, 56 F. (2d) 588, involving an averment with reference to interstate commerce similar to that contained in the count in controversy—

> that the allegation, in the past tense, that the stolen motor vehicle had, before the sale, been transported in interstate commerce, was, if a defect, rather one of form than of substance under Section 556 of Title 18 U.S.C.A. [R. S., Sec. 1025, *infra*, p. 40], and we are also of opinion, in accord with the thought in the Drexel case, that at any rate "within section 391 of Title 28 of U.S.C.A. [Section 269 of the Judicial Code as amended, *infra*, p. 40] if not strictly a formal it was certainly a 'technical defect' which did not 'affect the substantial rights of the parties.' The pleader had been inept in expressing his meaning but that meaning was clear."

In the *Drexel* case the indictment charged that the defendant received and concealed a certain motor vehicle which had been stolen at Philadelphia and "transported in interstate commerce." The court said that while "The more natural way to read the language undoubtedly is that the car 'had been transported,' rather than that it 'was being transported,' in interstate commerce," "the purpose of the allegation is entirely apparent; it was to charge the defendant with the offense of stealing a car [concealing a stolen car] which was part of interstate commerce, and practically he was adequately advised of what he must meet." It therefore ruled that the defect was merely a "formal" or "technical' defect. In *Grimsley* v. *United States,* 50 F. (2d) 509 (C.C.A. 5th), one judge dissenting, and in *Davidson* v. *United States,* 61 F. (2d) 250, 255 (C.C.A. 8th), allegations quite similar to those involved in the instant case and in the *Drexel* case were held to be fatally defective and not to present merely "formal" or "technical" defects.

In the *Drexel, Grimsley,* and *Davidson* cases the sufficiency of the allegations were, however, raised in appeals taken in the criminal proceedings themselves. Here the question is raised in a proceeding for *habeas corpus.* – While we believe that a convincing argument might have been made in support of the sufficiency of the indictment, even if the count in controversy had been attacked on an ap-

peal in the criminal proceeding (cf. *Hagner* v. *United States*, 285 U.S. 427), in view of the decisions of this Court and the considerations heretofore set out, it is unnecessary to do so in response to a petition for a writ of *habeas corpus*.

A somewhat similar question was recently presented to this Court in a petition for writ of certiorari to review the decision of the Circuit Court of Appeals for the Fifth Circuit in *Aderhold* v. *Hugart*, 67 F. (2d) 247, certiorari denied, 291 U.S. 676. In that case the petitioner had been convicted under an indictment which attempted to charge a violation of R.S. 3296, which makes it an offense for anyone to conceal distilled spirits which have been removed from a distillery to a place other than a bonded warehouse without the tax being paid. The indictment failed to allege that the tax had not been paid. Although there was no such offense known to the Federal law as that actually charged, the Circuit Court of Appeals held that the petitioner was not entitled to his release on habeas corpus, saying (pp. 247–248):

> on demurrer [the indictment] must have fallen for failure to allege a necessary element of the crime sought to be charged. The cases to this effect in *Woods* v. *United States* (C.C.A.) 26 F. (2d) 63, and *Dukes* v. *United States* (C.C.A.) 275 F. 142, relied on to support this judgment of discharge, were decisions on direct appeal from conviction. They have no application to collateral attack by writ of

> habeas corpus. In the latter, if there is such a class of crimes as the indictment apparently attempts to charge, and the court had jurisdiction over such crimes and over the person of the accused, the question of the sufficiency of the indictment to charge an offense cannot be raised or reviewed on habeas corpus. *Knewel* v. *Egan,* 268 U.S. 442, 446, 45 S.Ct. 522, 69 L.Ed. 1036. The trial court has power to determine, subject to orderly appeal, what the elements of the offense are and what the indictment should allege, and it ends inquiry about such things by deciding them. *Ex parte Watkins,* 3 Pet. 193, 7 L.Ed. 650; *In re Coy,* 127 U.S. 731, 8 S.Ct. 1263, 32 L.Ed. 274. Guilt or innocence, and the measure of punishment within the limits fixed by law, are the responsibility of the trial court and not of another judge on habeas corpus.

This Court on March 5, 1934, denied the petition for writ of certiorari (291 U.S. 676).

Moreover, in *Goto* v. *Lane,* 265 U.S. 393, 401–402, *supra,* this Court said:

> In the federal courts a discharge on *habeas corpus* of a prisoner held to answer a criminal accusation or confined under a judgment of conviction is granted only in the exercise of a sound judicial discretion. *Salinger* v. *Loisel, ante,* 224; *Storti* v. *Massachusetts,* 183 U.S. 138, 143. The remedy is an extraordinary one, out of the usual

> course, and involves a collateral attack on the process or judgment constituting the basis of the detention. The instances in which it is granted, when the law has provided another remedy in regular course, are exceptional and usually confined to situations where there is peculiar and pressing need for it or where the process or judgment under which the prisoner is held is wholly void.

In the instant case it is evident that, though perhaps ineptly expressed, the pleader was attempting in the count in question to charge the sale of a stolen motor vehicle in violation of Section 4 of the National Motor Vehicle Theft Act. Although it is immaterial to the present inquiry, it is interesting to note that there is nothing in the record to indicate even that the indictment was insufficient to inform the petitioner of the offense attempted to be charged, to enable him to prepare his defense, or to make it impossible for him successfully to plead the judgment of conviction in bar of any further prosecution for the same offense. So far as the docket entries show (R. 24, 41) there was no request for a bill of particulars. In addition, neither the evidence nor the instructions of the trial judge in the criminal case are in the present record, and there is consequently no showing by the petitioner that either was insufficient to justify a finding by the jury upon adequate

evidence that the sale of the stolen motor vehicle was the final step of a then existing interstate movement of the vehicle. In fact it is evident that the petitioner was in no way prejudiced by any defect in the indictment and that the question now raised is clearly an afterthought.

So far as the record discloses, it was not presented to the District Court which tried the petitioner; he did not make it the basis of an appeal in the criminal case, for no appeal was taken in that case; he did not file his application for *habeas corpus* until over a year after he had been committed to jail; release was sought in the District Court in this application on an entirely different ground from that now urged, and the question now raised was presented to a court for the first time after the instant case had been appealed to the Circuit Court of Appeals. Under such circumstances the language of this Court in *Grant Bros. Construction Company* v. *United States,* 232 U.S. 647, 661, seems peculiarly appropriate. In that case, an action for penalties for violation of the Alien Contract Labor Law, it appeared that the petition failed to allege that certain acts of the defendant were knowingly done, although knowledge was an essential element of the offense defined by the statute, but this Court, although it was considering the case on a writ of error to review the judgment for the penalties, said:

> The defendant was in no wise prejudiced by the defect, and to make it a ground for reversing the judgment, notwithstanding the theory upon which the trial proceeded, would be most unreasonable. *San Juan Light Co.* v. *Requena*, 224 U.S. 89, 96; *Campbell* v. *United States*, Id. 99, 106.

The only decision in a *habeas corpus* case cited by the petitioner is *Ventimiglia* v. *Aderhold*, 51 F. (2d) 308, a District Court decision (N.D.Ga.). This case dealt merely with the question of venue. In no place in his petition for writ of certiorari, so far as we can find, does the petitioner take the position that venue was not properly laid in the instant case if the indictment can be considered as having charged that the alleged vehicle was in interstate commerce at the time of sale. His position as we understand it, is that the trial court had no jurisdiction because, under his interpretation of the indictment, interstate commerce in the vehicle had ceased at the time of sale, and it is in this connection apparently that he cites the *Ventimiglia* case. (Brief in support of petition, p. 14.) The case has obviously no bearing upon the question here presented.

II

THE APPLICATION FOR WRIT OF HABEAS CORPUS IS PREMATURE

The petitioner was sentenced to serve four years on the second count of Indictment 28944, and four years on the third count of that indictment, the sentences to run consecutively.[1] (R. 24.) He admitted in his petition for writ of *habeas corpus* that the sentence on the second count is valid (R. 7), and he contests in this proceeding only the validity of the sentence on the third count. These sentences were imposed on November 30, 1931 (R. 24, 45), and the petitioner was delivered at the prison pursuant thereto on December 23, 1931. (R. 37.) Even if it be assumed that the sentence on the third count is invalid, as the petitioner contends, the Bureau of Prisons of this Department advises that if there be deducted from the sentence on the second count, the validity of which is not disputed, the full good conduct allowance of seven days a month permitted under the Act of June

[1] The sentence of two years on the first count of Indictment 28944 was directed to run concurrently with the sentences on the second and third counts. (R. 24.) Under Indictment 28945 a two-year sentence was imposed. (R. 34.) While this sentence was rendered several months prior to those under Indictment 28944 (R. 24), the warrants of commitment show that the sentences under Indictment 28944 were to date from November 30, 1931, and that the sentence under Indictment 28945 was to date from December 10, 1931 (R. 36, 39). It is evident, therefore, that the sentence under Indictment 28945 was in effect a sentence concurrent with those under Indictment 28944.

21, 1902, c. 1140, Section 1, 32 Stat. 397 (U.S.C., Title 18, Sec. 710), the sentence on that count would not expire until January 2, 1935.[6] It is evident, therefore, that the petitioner is now serving a concededly valid sentence which has not yet expired, and that even if this Court should determine that the sentence on the third count is invalid, it could not at this time discharge the petitioner from custody. The Court is, therefore, being called upon to determine a question which has not yet become anything more than academic.[7]

The object of the writ of *habeas corpus* is the liberation of those who may be imprisoned without just cause. *Ex parte Watkins*, 3 Pet. 191, 202. If the proceeding for the writ discloses that for any reason the petitioner must be remanded to custody, the writ will not lie. *In re Boardman*, 169 U.S. 39;

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[6] As the sentence upon the second count was rendered prior to July 29, 1932, the good conduct allowance is computed from the time the petitioner arrived at the penitentiary, December 23, 1931, and not from November 30, 1931, the date the warrant of commitment stated the sentence should commence to run. (R. 36.) Cf. Act of June 29, 1932, c. 310, Section 2, 47 Stat. 381 (U.S.C.Sup. VII, Title 18, Sec. 710 (a)).

[7] We are advised by the Bureau of Prisons that pursuant to a hearing held in August of this year, subsequent to the issuance of the writ of certiorari, the Parole Board granted the petitioner a parole effective December 15th next. Nevertheless, his sentence under the second count cannot expire, even with the good conduct allowance subtracted, until January 2, 1935. (See quotation from *Anderson* v. *Corall*, 263 U.S. 193, at p. 35, *infra*.) It means only that several weeks of the sentence would be served on parole.

Iasigi v. *Van de Carr*, 166 U.S. 391; *Stallings* v. *Splain*, 253 U.S. 339, 343. So long as one is confined under a valid sentence it cannot be said that he is being restrained without cause. Illegal restraint cannot begin until he commences the service of a sentence which is invalid. Only then is he in a position to secure relief on *habeas corpus*. As was said by this Court in *In re Swan*, 150 U.S. 637, 652, with respect to a situation similar to that here presented:

> It is further contended that the court exceeded its power in that the payment of costs was required, because the costs were in the nature of a fine, and therefore the punishment inflicted was both fine and imprisonment. * * * the sentence here was that the petitioner be imprisoned "until he returns to the custody of the receiver, the barrel taken by him from the warehouse without warrant of law. And when that has been surrendered, that he suffer a further imprisonment thereafter in said county jail for three months and until he pay the costs of these proceedings." As the prisoner has neither restored the goods nor suffered the imprisonment for three months, even if it was not within the power of the court to require payment of costs and its judgment to that extent exceeded its authority, yet he cannot be discharged on *habeas corpus* until he has performed so much of the judgment or served out so much of the sentence as it was within the power of the court to impose. *Ex parte Lange*, 18 Wall 163; *Ex parte Parks*, 93 U.S. 18.

And in *De Bara* v. *United States*, 99 Fed. 942, it was said by Circuit Judge (later Justice) Day, speaking on behalf of the Circuit Court of Appeals for the Sixth Circuit (pp. 947–948):

> Under a writ of habeas corpus the inquiry is, does the judgment exceed the authority of the court, and is the prisoner serving under a sentence beyond the power of the court to impose?
>
> It is true that the cases wherein the writ has been denied, because a part only of the sentence was within the power of the court to impose, have generally been those in which the judgment was of a clearly separable nature, as for costs and imprisonment, where there was power only to impose the one or the other. We see no reason why the rule should be limited to such cases, and think the true principle to be that, before a prisoner can be discharged upon habeas corpus, it must appear that he is serving by virtue of a judgment which the court had no power to impose. As long as he is serving an imprisonment within the limits of a term which the court might lawfully impose, acting within its power and jurisdiction, he cannot be discharged on habeas corpus, no matter how irregular or erroneous the judgment may be.
>
> In the present case the court had power to impose so much of the judgment as is now operative upon the prisoner, and therefore he cannot have relief by the writ of habeas

> corpus. We have already seen that it was within the power of the court, in any aspect of the case, to impose a sentence upon the prisoner of 18 months. This much of the sentence the prisoner has not yet served. We do not undertake to determine herein what may be the rights of the prisoner at the expiration of the term of 18 months, nor do we wish to be considered as in any wise foreshadowing the views which the court may hold as to his rights, should further application for the writ be made at that time. All that is now determined is that the petitioner, not having served the period for which he might legally be sentenced, cannot now have the benefit of the writ.

See also *Eori* v. *Aderhold*, 53 F. (2d) 840 (C.C.A. 5th); *Dodd* v. *Peak*, 47 F. (2d) 430, 431 (App.D.C.); *Carter* v. *Snook*, 28 F. (2d) 609, 610 (C.C.A. 5th); *Schultz* v. *Biddle*, 19 F. (2d) 478, 480 (C.C.A. 8th); *Cohen* v. *Biddle*, 12 F. (2d) 704, 705 (C.C.A. 8th); *Mabry* v. *Beaumont*, 290 Fed. 205 (C.C.A. 9th); *Price* v. *Zerbst*, 264 Fed. 669 (C.C.A. 5th); *Woodward* v. *Bridges*, 144 Fed. 156 (Mass.); *Ex parte Davis*, 112 Fed. 139 (C.C.Fla.).

We think it is, therefore, evident that the application for the writ in the instant case is premature. The petitioner, however, in effect, asks this Court to create an exception to the general rule heretofore stated because of the provisions of the Parole Law. Under that statute a prisoner whose record of conduct shows that he has observed the rules of the

institution in which he is confined, may be released on parole when he has served one-third of the total of the term or terms for which he was sentenced. (Act of June 25, 1910, c. 387, Sec. 1, 36 Stat. 819, as amended by the Act of January 23, 1913, c. 9, 37 Stat. 650 (U.S.C., Title 18, Sec. 714).) In his petition for writ of *habeas corpus*, the petitioner alleged that he had served one-third of the valid four-year sentence on the second count of Indictment 28944; that he was, therefore, entitled to make application to the Parole Board of the penitentiary for a parole and to have such application heard and decided by the Board; but that he was being deprived of this right because of the void sentence under the third count of the indictment, the Parole Board having no authority to consider an application for parole until the petitioner had served at least one-third of his total term of eight years, the aggregate of the two terms of four years on each of the two counts. (R. 8.)

Section 3 of the Parole Act provides that:

> If it shall appear to said board of parole from a report by the proper officers of such prison or upon application by a prisoner for release on parole, that there is a reasonable probability that such applicant will live and remain at liberty without violating the laws, and if in the opinion of the board such release is not incompatible with the welfare of society, then said board of parole may in its discretion authorize the release of such

> applicant on parole, and he shall be allowed to go on parole outside of said prison, and, in the discretion of the board, to return to his home, upon such terms and conditions, including personal reports from such paroled person, as said board of parole shall prescribe, and to remain, while on parole, in the legal custody and under the control of the warden of such prison from which paroled, and until the expiration of the term or terms specified in his sentence, less such good time allowance as is or may hereafter be provided for by law; and the said board shall, in every parole, fix the limits of the residence of the person paroled, which limits may thereafter be changed in the discretion of the board. * * * [Act of June 25, 1910, c. 387, Sec. 3, 36 Stat. 819; U.S.C. Title 18, Sec. 716.]

It will thus be seen that the granting of a parole rests within the discretion of the Parole Board. There is certainly no vested right to the parole. It may be denied if the Board feels that there is reason to believe that the applicant will not refrain from violating the law or if it is of the opinion that his release will be "incompatible with the welfare of society." It was, accordingly, held by the Circuit Court of Appeals for the Ninth Circuit in *Redman* v. *Duehay*, 246 Fed. 283, 284, that the decision of the Parole Board that a prisoner should not be released on parole could not be interfered with by the courts upon an application for a writ of *habeas corpus* filed by the prisoner. The court said (p. 285):

> Language expressive of legislative intent could not be plainer. It must appear to the board by showing in the manner prescribed that there is reasonable probability that the applicant for a parole will abide by the law; and if in the belief or judgment of the board his release is not incompatible with the welfare of society, the board may, in its discretion, authorize parole. The opinion called for is that of the board, and the power to authorize release is vested exclusively in the board to be exercised as it may, in its wisdom, see fit.
>
> Petitioner, having failed to show that he is entitled to relief from the courts, was properly denied the writ.

Not only is it obvious that the statute does not confer any vested right upon the prisoner to be released from confinement on parole after he has served one-third of his sentence, even upon a showing that he has not violated the rules of the prison, but the parole when granted does not shorten the term. As was said by this Court in *Anderson* v. *Corall*, 263 U.S. 193, 196, "The parole authorized by the statute does not suspend service or operate to shorten the term. While on parole the convict is bound to remain in the legal custody and under the control of the warden* until the expiration of the term, less allowance, if any, for good conduct.

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*Since the Act of May 14, 1930, c. 255, Sec. 2, 46 Stat. 272 (U.S.C.Sup. VII, Title 18, Sec. 723b), a paroled prisoner remains in the custody and control of the Parole Board created by that Act.

While this is an amelioration of punishment, it is in legal effect imprisonment." See also *Anderson* v. *Williams*, 279 Fed. 822, 826, 827 (C.C.A. 8th).

We think it is obvious, therefore, that where a prisoner is confined under a valid sentence, the only effect that an invalid consecutive sentence may have is to postpone or possibly defeat the opportunity which the prisoner would otherwise have of seeking under the Parole Law the privilege of an amelioration of his punishment under the valid sentence. It cannot, under any view, be considered as working a discharge from further restraint under the valid sentence. One case has been found which contains statements opposed to the thesis just stated. In *O'Brien* v. *M'Claughry*, 209 Fed. 816, 821, the Circuit Court of Appeals of the Eighth Circuit said:

> We cannot conceive that the second sentence against the petitioner, utterly void as it was and is, should be used to defer his right to apply for a parole (*United States* v. *Pridgeon*, 153 U.S. 48, 14 Sup. Ct. 746, 38 L.Ed. 631)* and, while fully convinced that the rule would be otherwise in the absence of the parole law, this case is reversed and remanded, with directions to the District Court to discharge the petitioner from the

* It is evident from the *Pridgeon* decision that it must have been cited in respect of the proposition that the judgment was void insofar as it imposed a sentence in excess of that which might be lawfully imposed. As the Parole Law was not passed until 17 years later, there is, of course, no reference to that law in the opinion.

> custody of the defendant as to the charge of larceny but to remand him upon the charge of breaking into a post office.

We think that this decision displays a mistaken conception of the effect of the Parole Law upon the status of a prisoner serving a valid sentence. It necessarily assumes that when a prisoner has served one-third of his sentence and has not breached any of the prison rules he has a vested right to a parole, and that if the parole is not granted further incarceration under the sentence becomes illegal. Such a viewpoint, however, completely ignores the theory and purpose of the statute. We submit, therefore, that the *O'Brien* decision is not well considered.[10] While the record does not disclose that the question under discussion was raised in either of the courts below, it is clear that on writ of certiorari the Government as respondent is entitled to urge any ground in support of the judgment of the Circuit Court of Appeals. *Langnes* v. *Green*, 282 U.S. 531, 538–539; *Story Parchment Co.* v. *Patterson Co.*, 282 U.S. 555, 560.

[10] While this decision was followed by the same court in *Cahill* v. *Biddle*, 13 F. (2d) 827, 828, the later decision of the court in *Hostetter* v. *United States*, 16 F. (2d) 921, 923, indicates that the court did not regard it as authoritative even upon the point here involved. (See "Point VI.") It must be admitted, however, that the decision in the *Hostetter* case is rather difficult to understand because of the brevity of the discussion.

CONCLUSION

For the reasons stated we respectfully submit that the judgment below should be affirmed.

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OCTOBER, 1934.

APPENDIX

STATUTES INVOLVED

The National Motor Vehicle Theft Act, c. 89, 41 Stat. 324, 325 (U.S.C., Title 18, Sec. 408), provides as follows:

> That this Act may be cited as the National Motor Vehicle Theft Act.
>
> SEC. 2. That when used in this Act:
>
> (a) The term "motor vehicle" shall include an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle not designed for running on rails:
>
> (b) The term "interstate or foreign commerce" as used in this Act shall include transportation from one State, Territory, or the District of Columbia, to another State, Territory, or the District of Columbia, or to a foreign country, or from a foreign country to any State, Territory, or the District of Columbia.
>
> SEC. 3. That whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000, or by imprisonment of not more than five years, or both.
>
> SEC. 4. That whoever shall receive, conceal, store, barter, sell, or dispose of any motor vehicle, moving as, or which is a part of, or which constitutes interstate or for-

eign commerce, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000, or by imprisonment of not more than five years, or both.

SEC. 5. That any person violating this Act may be punished in any district in or through which such motor vehicle has been transported or removed by such offender.

Revised Statutes, Section 1025 (U.S.C., Title 18, Sec. 556), provide as follows:

> No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant. (R.S. § 1025.)

Section 269 of the Judicial Code, as amended by the Act of February 26, 1919, c. 48, 40 Stat. 1181, so far as pertinent, provides:

> * * * On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.

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SUPREME COURT OF THE UNITED STATES.

No. 15.—October Term, 1934.

Charles L. McNally, Petitioner, *vs.* Henry C. Hill, Warden United States Northeastern Penitentiary, Lewisburg, Pa.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[November 5, 1934.]

Mr. Justice Stone delivered the opinion of the Court.

Certiorari, 292 U. S. 619, brings this case here for review of a judgment of the Circuit Court of Appeals directing dismissal, on the merits, of a petition for a writ of *habeas corpus*. Petitioner was convicted and sentenced to be imprisoned upon two indictments framed under the Conspiracy Act of May 17, 1879, c. 8, 21 Stat. 4, as amended by Act of March 4, 1909, c. 321, § 37, 35 Stat. 1088, 1096, U. S. C., Title 18, § 88, and the National Motor Vehicle Theft Act of October 29, 1919, c. 89, 41 Stat. 324, 325, U. S. C., Title 18, § 408. The indictment which alone need be considered here was in three counts: the first charged petitioner and others with conspiracy to violate the provisions of the Motor Vehicle Theft Act; the second, the interstate transportation of a stolen motor vehicle; and the third, which is assailed here, the violation of § 4 of the Motor Vehicle Theft Act, by the sale in New Jersey of a motor vehicle which had been stolen in New York, "knowing that the vehicle had been so stolen and transported in interstate commerce." Petitioner was sentenced for a term of two years on the first count and for terms of four years each on the second and third counts, the sentence on the first to run concurrently with that on the second, the sentence on the second and third to run consecutively. Service of sentence was begun on November 30, 1931. It is conceded that the sentence on the second count, less allowances for good behavior, has not expired and that service of sentence on the third has not yet begun.

On April 6, 1933, the petitioner filed his petition for writ of *habeas corpus* in the district court for the middle district of Pennsylvania. He assailed the conviction and sentence on the third